

**No. 11,347**

IN THE

**United States Circuit Court of Appeals  
For the Ninth Circuit**

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LERNER STORES CORPORATION (a corporation),  
vs.  
WILFRED A. LERNER,

*Appellant,*  
*Appellee.*

**APPELLANT'S REPLY BRIEF.**

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**FILED**

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- I. THE RECORD AND THE BRIEF FOR APPELLANT PRESENT ISSUES WHICH SHOULD BE CONSIDERED ON THE MERITS. APPELLANT'S BRIEF AND SPECIFICATION OF ERRORS SHOULD NOT BE JUDGED BY THE RIGID RULES APPLICABLE TO ASSIGNMENTS OF ERROR.

The Brief For Appellant sets forth appellant's Specification Of Errors wherein in general terms appellant states the respects in which the trial Court erred. The Specification Of Errors does not include a statement of the material evidence upon which the trial Court failed to make any findings nor a list of the findings which are in conflict with and unsupported by evidence. But the Brief follows the Specification Of Errors with a Statement Of The Evidence which contains appropriate references to the printed Transcript Of Record and a discussion,

under separate bold-faced headings, of each of the findings which is unsupported by evidence and each of the material points upon which the Court failed to make findings. Appellant found it necessary to state the evidence and to discuss the findings in detail because, to a greater degree than in most cases, suits in equity for unfair competition turn upon a detailed analysis and appraisal of all of the items of evidence, and it would be difficult and misleading and involve substantial repetition for appellant to present an adequate summary of the respects in which the trial Court erred except in the manner set forth in the Brief For Appellant, to wit: A general Specification Of Errors followed by a detailed Statement Of The Evidence And Findings. Appellant submits that it has endeavored to prepare its Brief in accordance with the rules of this Court and in a manner which will not inconvenience the Court in the consideration of the case and that the points urged in the Specification Of Errors should therefore be considered on the merits of the argument and authorities set forth in the Brief.

The decisions cited by appellee do not support the criticism of the Brief which he makes. This is illustrated by a consideration of appellee's first citation: *Dreyer Commission Co. v. Hellmich*, 8 Cir., 25 F. (2d) 408. That was an action at law to recover a tax paid under protest. The parties had waived a jury. The trial Court rendered judgment in favor of the defendant. The plaintiff appealed. On appeal the appellant assigned as error the action of the trial Court in finding certain facts as well as failing to

render conclusions of law and judgment in favor of the appellant. The Court of Appeals held that the *Assignment Of Errors* did not permit that Court to review the sufficiency of the evidence. The basis for the decision was not any defect in the *Specification Of Errors* in the appellant's brief; the decision turned upon the well-established rule (in effect prior to adoption of the new Rules of Civil Procedure for the District Courts in 1938) that in jury-waived cases the findings of the trial Court have the same effect as the verdict of the jury, and that in such cases the question of the insufficiency of the evidence cannot be raised by an *Assignment Of Errors* in the appellate Court. This clearly appears from the case which the Court in the *Dreyer Commission Co.* case cites as the authority for the statement quoted in Appellee's Brief, *Tatum v. Davis*, 8 Cir., 283 F. 948. The *Tatum* case also was an action at law in which the parties waived a jury. During the trial the appellant had not made any complaint of rulings of the trial Court. Accordingly, on appeal in such case the sufficiency of the evidence to support the findings was not open to question, the Court stating (p. 949):

“No complaint is made of rulings during the progress of the trial, so the only question here is, whether the facts found are sufficient to support the judgment against plaintiff in error.”

Appellee also quotes from the decision of this Court in *Mutual Life Insurance Co. v. Wells-Fargo Bank & Union Trust Co.*, 86 F. (2d) 585. (Appellee's Brief, p. 4.) However, an examination of the opinion of this Court in that case makes doubly clear the inapplicabil-

ity to the case at bar of appellee's contention. In the *Mutual Life Insurance Co.* case the plaintiff brought an action at law against the defendant. There was a jury trial. The verdict and judgment were in favor of the plaintiff. Defendant appealed, seeking a review of the sufficiency of the evidence to support the verdict. The Court of Appeals held that the particular *Assignment Of Error* in question was neither proper nor sufficient to raise the point sought to be considered, citing *Dayton Rubber Mfg. Co. v. Sabra*, 9 Cir., 63 F. (2d) 865, in which this Court stated that a similar *Assignment Of Error* in the appellate Court was insufficient for a review by the appellate Court of the sufficiency of the evidence to support the verdict. This Court held (p. 865):

"This assignment is insufficient to raise the question sought to be presented which must be raised by a motion for a directed verdict or ruling on instructions asked or given during the trial of the case. It cannot be raised by an assignment of error after the rendition of the verdict."

The two additional cases cited in this section of Appellee's Brief, to wit: *Century Indemnity Co. v. Nelson*, 8 Cir., 90 F. (2d) 644, and *Humphreys Gold Corp. v. Lewis*, 9 Cir., 90 F. (2d) 896, are to the same effect.

The rule of the foregoing cases (subsequently changed with respect to jury-waived cases by Rule 52(a) of the Rules of Civil Procedure for the District Courts) was that in law actions, including those where a jury had been waived, the appellate Court reviewed only rulings of the trial Court and not the evidence

as such. Accordingly assignments of error made in the trial Court and pointing out the rulings of that Court deemed erroneous were indispensable. That rule was in sharp contrast to the rule formerly and now applicable to suits in equity, the classification into which the case at bar falls. In the case of *Standard Acc. Ins. Co. v. Simpson*, 4 Cir., 64 F. (2d) 583, the Court, after acknowledging that weight must be given to the findings of the trial judge, nevertheless reversed the decision of the lower Court, and stated (p. 588):

“\* \* \* but in an appeal in equity we review the facts as well as the law, and the review is a real review and not a perfunctory approval. After carefully weighing and considering the evidence in the light of the rule, we do not feel that it is sufficient to justify the conclusion that the company either expressly or by implication vested McCrae with authority to enlarge its liability under bonds previously executed.”

These decisions show that in the case at bar, unlike those cited by appellee, there is no substantive legal obstacle to a review by this Court of the sufficiency of the evidence to support the findings and judgment. With respect to the claimed defect in appellant's Specification Of Errors, appellant respectfully submits that its Brief upon the points relied upon by appellant is in substantial compliance with the rules of this Court and presents the evidence and the law applicable thereto with certainty and in a manner which is calculated to serve the convenience of the Court. (*Monaghan v. Hill*, 9 Cir., 140 F. (2d) 31.)

The questions presented upon this appeal are not governed by appellee's erroneous suggestion that if there was a conflict of evidence upon any issue the findings of the trial Court against appellant are fatal to this appeal. On the contrary, in cases such as the one at bar the rule is firmly settled that the mere existence of a conflict in evidence does not deprive this Court of the power to reverse the decision of the trial Court, and this Court may consider precisely such points as are raised by appellant in this case. As stated in *Sanders v. Leech*, 5 Cir., 158 F. (2d) 486, 487:

"Under that Rule, (Rule 52(a) Rules of Civil Procedure for District Courts) as it plainly reads and has been interpreted by the courts, it is not for the appellate court to substitute its judgment on disputed issues of fact for that of the trial court where there is substantial credible evidence to support the finding. It may reverse, though, under the rule (1) where the findings are without substantial evidence to support them; (2) where the court misapprehended the effect of the evidence; and (3) if, though there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case."

See also, *O'Brien, Manual of Federal Appellate Procedure*, (3rd Ed.), where the author states (p. 20) :

"Where findings of fact are contrary to the weight of the evidence, even though they were sustained by the spoken word from the witness stand, the Appellate Court has power to reverse the judgment based thereon; while the findings of fact are presumptively correct, they are not conclusive on appeal if against the clear weight of the evidence."

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**II, III. REPLY TO PARTS II AND III OF APPELLEE'S BRIEF.**  
**APPELLANT'S CLAIM IS THAT MATERIAL FINDINGS**  
**ARE NOT SUPPORTED BY EVIDENCE AND THAT ADDITIONAL FINDINGS SHOULD HAVE BEEN MADE.**

Appellee devotes pages 12 to 23 of his brief to a discussion entitled "The Findings Support the Judgment". That discussion does not meet any point raised by appellant. Appellant's complaint as to the findings is two-fold: (1) That the trial Court failed to make findings on material issues; (2) That a number of the findings necessary to support the judgment are not supported by evidence.

Appellant does not contend that the findings made by the trial Court do not support the judgment if such findings are accepted as disposing of all of the issues in the record. The record shows that the findings were prepared by appellee (Tr. 286), and he drew a set of findings which support the judgment. But the trial Court *expressly* and carefully refrained from making findings on undisputed material facts which would militate against the findings prepared by appellee and which would call for a different conclusion in the case. (Tr. 287-288.) The points upon

which the trial Court thus refused to have the findings reflect the record are discussed in the Brief for Appellant at pages 21-31, to which we refer the Court.

Appellee has cited and quoted from several decisions as being cases from which the findings in the case at bar were adopted. But findings in a case containing different facts, even though proper in such other case, are not proper in this case. In fact those decisions from which appellee has quoted show upon the face of the very quotations that they turn upon their particular facts and do not aid in the evaluation of the very different facts contained in the record at bar. Thus in *Griesedieck Western Brewery Co. v. Peoples Brewing Co.*, 8 Cir., 149 F. (2d) 1019, quoted at page 16 of Appellee's Brief, it appeared:

(1) That the plaintiff and defendant were not in competition with each other; (2) That the plaintiff had never sold any of its beer in any market in which defendant had sold its beer and the markets in which defendant sold its beer were (to quote the language of the Court) "wholly remote the one from the other".

The Brief For Appellant (pp. 10-13; 15-18) sets forth the evidence in the instant case which, differing from the *Griesedieck Western Brewery Co.* case was:

(1) That appellant and appellee are seeking patronage in the same area, it appearing that appellant's three stores in San Francisco and Oakland were patronized regularly and continually by residents of San Jose, Palo Alto, Redwood City, Los Altos and other peninsular communities to the extent of a

substantial number of transactions, and appellee's store likewise is patronized by residents of those same communities; (2) That the cities on the San Francisco peninsula from which appellant and appellee both seek patrons are within the trading area of San Francisco and Oakland; (3) That patrons of appellant's stores have visited appellee's store under the mistaken idea that it was one of appellant's stores. These facts clearly distinguish the *Griesedieck Western Brewery Co.* case. But they are analogous to another case decided by the Court which decided that case, the Circuit Court of Appeals for the Eighth Circuit, to wit, the leading case of *Sweet Sixteen Co. v. Sweet "16" Shop, Inc.*, 15 F. (2d) 920. A reading of the *Sweet Sixteen Co.* case (Brief For Appellant, p. 45), leaves no doubt that upon a record like the one at bar the view of the Circuit Court of Appeals supports the position of appellant in the case at bar.

Appellee's quotation from *National Grocery Co. v. National Stores Corp.*, 123 Atl. 740 (Appellee's Brief, pp. 18-21), likewise reveals that there the defendant was doing business at a place where, at the time of suit, the plaintiff had no customers and that the Court recognized the distinction between such a case and one like the present case, when the Court stated (Appellee's Brief, p. 20):

"For reasons already touched upon, it would be absurd to say that any such intention should permit the preempting of the use of the name (National) *at a place and time where such a supposed business enterprise had no customers or business, and therefore nothing to lose.* It

is entirely too remote and fanciful for the complainant to object to another using a name in a certain locality, *not because he has already established his trade there*, but because he may do so in the future. For it is equally probable he may not. *It is significant that in all the cases cited by the complainant in its brief there was an actual competition between the parties, \* \* \*,* (Italics added.)

It will also be noted that in appellee's quotation from that case the Court states that it is obvious, by force of the kind of business in which each of the parties in that case were engaged (the operation of cash-and-carry grocery stores), persons would not drive twenty-five or thirty miles to patronize one of such stores. But with respect to a case, such as the one at bar, it is not unnatural for women to drive from the smaller communities surrounding San Francisco and Oakland to such larger cities to shop for wearing apparel, and the record shows that is what they do. (Brief For Appellant, pp. 10-13.)

Appellee also cites the case of *The Ida May Co. Inc. v. Ida May Ensign*, 20 Cal. App. (2d) 339, as a "similar" case from which he has adopted findings. Appellant submits that there is no similarity between that case and this one. In *The Ida May Co.* case the defendant, a former officer and stockholder of the plaintiff severed all connection with the plaintiff in 1934 and at a later date opened a business dealing in similar merchandise under the name of "Ida May Ensign", which was the full true name of defendant.

The trial Court specifically found that in opening and designating her business defendant did so "under her full name". In short, defendant there did not act similarly to the defendant at bar and did not omit that part of her name which would tend to prevent confusion, nor did the defendant Ida May Ensign stress that part of her name "Ida May" which was similar to the name of plaintiff's business. The defendant in that case, in using her full name without emphasizing any part thereof obviously attempted to comply with the equitable requirement stated by this Court in the case of *Horlick's Malted Milk Corp. v. Horluck's Inc.*, 9 Cir., 59 F. (2d) 13, as follows (p. 15):

"But where a personal name has become associated in the minds of the public with certain goods or a particular business, it is the duty of a person with the same or similar name, subsequently engaging in the same or a similar business or dealing in like goods, to take such affirmative steps as may be necessary to prevent his goods or business from becoming confused with the goods or business of the established trader."

The very definite distinction between the case at bar and *The Ida May Co.* case is succinctly pointed out in *Nims, Unfair Competition and Trade Marks* (Third Edition) as follows (p. 209):

"It will be seen by the foregoing cases that there is a marked difference between the use of a complete name, first name, middle name, if any, and

surname, and the use of the surname alone. The likelihood of confusion is much increased in the latter use. And there is little doubt but such use of a name will be enjoined, while the injunction will often be refused where a person uses his full name, and uses it honestly."

At page 21 of his brief appellee cites the case of *Yellow Cab Co. of San Diego v. Sachs*, 191 Cal. 238 and contends that that case was one where a taxicab company doing business in Los Angeles using a name like that used by plaintiff in the same business in San Diego, was denied an injunction upon the ground that they were not operating in the same territory. Appellee has erroneously stated the facts involved in that case. The facts and ruling in that case are set forth hereinafter in the Appendix, page i.

Appellee also cites and relies upon the case of *Eastern Outfitting Co. v. Manheim* (Wash.), 110 P. 23. (Appellee's Brief, p. 21.) That case discloses the fallacy of appellee's position more clearly than any argument that could be presented by appellant, for subsequent to the decision therein, the Supreme Court of Washington specifically distinguished it from a case like the case at bar, *Groceteria Stores v. Tebbetts*, 162 P. 54, stating:

"Relying on the rule announced in *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428, 35 L.R.A. (N.S.) 251, 110 Pac. 93, respondent asserts that, as appellant has established *no place of business* in the city of Tacoma and has done

no business there, it is not entitled to the exclusive use of the word 'groceteria' in that community. It is true, in *Eastern Outfitting Co. v. Manheim*, we held that the fact to be ascertained was, what is the market of the complaining party and his protection in the use of his tradename is coextensive with his market. The court then found that the plaintiff's place of business was in Seattle, and *it was doing no business whatever in Spokane*, and was therefore not entitled to the use of the tradename in Spokane as against defendant, who had, at a large expense, established a business in Spokane. The rule as laid down in the *Eastern Outfitting Co.* case, *supra*, in any event is not applicable here, as it is alleged in the complaint, and admitted by the demurrer, that *appellant is doing business with the people of Tacoma, which makes Tacoma a part of its market."* (Italics added.)

The uncontroverted evidence in the present case is equal to the allegations in the complaint admitted by the demurrer in the *Groceteria Stores* case.

In concluding this portion of his brief appellee cites several California cases and quotes from *Tomsky v. Clark*, 73 Cal. App. 412 (Appellee's Brief, p. 22) for the apparent purpose of having this Court believe that in California a later comer can use his family name in a competing business with impunity and without regard to the particular mode of use and the harm done thereby. As shown hereinabove, the cases, including the California cases, do not support such a rule.

The case of *Tomsky v. Clark*, is discussed herein-after in the Appendix, page ii, and from that discussion it will be seen that that case does not support appellee's contention.

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#### IV. REPLY TO PART IV OF APPELLEE'S BRIEF.

- A. Appellant's stores are known as Lerners to the great majority of its customers and prospective patrons.

Appellant has contended that the Court committed prejudicial error in failing to make a finding reflecting the material and undisputed proof that the majority of appellant's patrons and prospective customers identify and designate appellant as "Lerner's". Appellee asserts that since the trial Court found that appellant has never engaged in business in San Jose and that appellee was first in the field in San Jose (Appellee's Brief, pp. 23-24), the issue as to the name by which appellant is known becomes immaterial. Appellant has shown elsewhere herein that the record shows without conflict that prior to the time appellee began business appellant had an established patronage from residents of San Jose and other peninsula communities. The question of the name by which appellant was known and designated by its customers and prospective patrons is therefore one of the vital issues of the case.

The trial Court failed to make a finding in response to the evidence that appellant is known and designated as "Lerner's". Appellee's reference to the evidence

bearing upon this point tends to create an inaccurate impression of what the evidence actually shows. Appellee's assertion that only "some" (Appellee's Brief, p. 24) persons or customers refer to appellant as "Lerner's" is definitely not true. The facts show that a "majority", "most", and practically 100 per cent of the persons doing business with appellant, refer to it as "Lerner's". (Tr. 194, 213, 224, 225-227, 228, 192.) The transcript references on this point at page 24 of Appellee's Brief are not to the contrary and actually support appellant's statement of the evidence.

Appellee further seeks to deprecate the materiality of this evidence and makes the bald assertion that finding that appellant's business was known as "Lerner's" would not call for a different result in this case. In the first place, such a finding would be only one of several which appellant contends the Court should have made and which, if made, would call for a different result. In the second place, a finding that appellant's business was known as "Lerner's" would immediately point up the significance in the conduct of appellee in calling and advertising his business as "Lerner's" though he had never been in the retail business before, had never previously engaged in any business in San Jose and had never before been designated as "Lerner's".

Appellee contends that a portion of Finding VI quoted in his brief (pp. 24-25) makes unnecessary any finding that appellant's business is known as "Ler-

ner's". That finding, to the effect that persons of ordinary intelligence would not confuse appellee's store with a store of appellant, states merely the broadest kind of conclusions and can be given no greater weight than the facts which may be found in the record to support it. Appellee's claim of the distinctive differences in the style of lettering used on his store front and in his advertising to display the name of his business must be judged by the evidence. A sample of appellee's advertising carrying the name "Lerner's" appears on pages 12-15 of the Transcript. The same name in front of his store appears on the photographs which are plaintiff's Exhibits 9 and 10. The same name in front of appellant's stores appears on the photographs which are plaintiff's Exhibits 1 and 2. In addition, plaintiff's Exhibits 3, 4, 5, and 6 show the lettering on other stores of appellant in California. These various photographs have not been reproduced in the Transcript but are before the Court. They very definitely negative the broad claim of distinction made in Finding VI, particularly when considered in the light of the fact that both the store of appellee and the stores of appellant are known by the public as "Lerner's".

The foregoing consideration of portions of Finding VI does not constitute appellant's complete consideration of that finding. Various elements thereof have been segregated and separately discussed in the Brief For Appellant at pages 25-27.

- B. The trial Court should have made a finding showing the reputation which appellant had established.

In subdivision B of Appellee's Brief (p. 27), he contends that appellant was not prejudiced by the omission of the Court to find (in accordance with the evidence) that appellant had established a reputation for selling up-to-date, well-styled apparel at prices below those of its competitors.

Such facts, if found by the Court, would have a definite bearing on the likelihood of confusion between appellee's store in San Jose and appellant's stores, because, appellant having such a reputation, persons would be more likely to confuse stores of appellant and appellee than if appellant did not have such a well established reputation.

Appellee stresses the fact (Appellee's Brief, p. 24) that appellant does not advertise in newspapers. While appellant does not advertise in the conventional way, the evidence is that by means of its many stores located all over the country in the most prominent locations, its millions of customers and many millions of transactions each year, it has accomplished the equivalent of advertising and has built up a reputation for selling up-to-date, well-styled apparel at popular prices (Tr. 216-217) which prices are below those of most of its competitors (Tr. 200) and department stores. (Tr. 65, 66, 117, 216-217.) Appellee seeks to raise some question as to the extent of the evidence on this subject, but an examination of the testimony referred to will show that the evidence on this subject is both complete and undisputed.

Appellee also urges that the failure of the Court to make a finding on this subject is not prejudicial because "the Court found that there was no fraud, confusion or unfair competition". (Appellee's Brief, p. 27.) In the first place it is appellant's conception that one of the requirements in an unfair competition case is that the plaintiff prove that he has established a reputation and good will which the defendant is damaging. (*Nims*, supra, p. 110.) In the second place, appellee is assuming the very point in issue. Merely because the trial Court made a finding that there was no fraud, confusion or unfair competition does not preclude appellant from establishing in this Court that there is no substantial evidence to support such finding. One of the elements in such proof by appellant is that it did have the reputation above mentioned, by reason of the existence of which persons familiar therewith probably would and actually did mistake appellee's store for a store of appellant. It was natural that this should occur, because appellee was a complete unknown in the retail business or in any business in San Jose and he designated and advertised his store under a name which did not point to him, but by reason of its wide reputation it did point to appellant, whose business had become known by the name which appellee saw fit to use, unaccompanied by any means of identifying him with that name.

C. Appellant had an established trade with persons from San Jose and adjacent cities.

Under subdivision C of his Brief (p. 28) appellee attempts to controvert that portion of the Brief For Appellant wherein appellant has shown that the trial Court erroneously failed to make a finding which reflected the undisputed material proof that at the time appellee began business appellant's stores in San Francisco and Oakland included among their customers a substantial number of residents of San Francisco peninsula cities, including San Jose. The evidence on this point is set forth in the Brief For Appellant, pages 11-15, 23. Appellee, in disputing that appellant had established such a patronage, first tries to have the point determined by this Court solely upon the testimony of the witness Graham Magee, to the effect that Mr. Magee did not know how many customers came from San Jose to San Francisco for the express purpose of patronizing appellant, and he would not say whether or not appellant's business in San Jose alone would be characterized as "considerable". An examination of the testimony of Mr. Magee reveals that he was unwilling to state the volume of appellant's business from the outlying portions of the San Francisco trading area in other than general terms because he is an officer of appellant whose headquarters are in New York and whose duties deal with the business of appellant on a national scale; he referred the Court to the business records kept in each of appellant's stores, and preferred to have such records show the specific extent

of appellant's business in San Jose and other peninsular communities. (See quotation from his testimony in Appellee's Brief, p. 34.)

Appellee next purports to consider the records referred to by Mr. Magee (Appellee's Brief, p. 36) and asserts that since the evidence showed that appellant had only 27 transactions per month with persons from San Jose, it did not compel the conclusion that the trial Court should have found that the appellant had established a substantial business. Appellee's treatment of the evidence on this point, is,—to borrow a phrase from Appellee's Brief,—“if not reckless, at least careless”. (Appellee's Brief, p. 37.) Appellee fails to take into account the indisputable evidence referred to in the Brief For Appellant at page 12: (1) That appellant's business records show that in addition to the 324 transactions per year with residents of the city of San Jose, appellant's Market Street store had  $2\frac{1}{2}$  times as many transactions with residents of Palo Alto, an additional  $2\frac{1}{2}$  times as many transactions with residents of Redwood City, and additional customers from Los Altos, Santa Clara and other peninsular communities; (2) That appellant's Grant Avenue store in San Francisco and its Oakland store obtained additional patronage from residents of each of such communities; (3) That such customers patronize appellant's stores regularly and continually and not merely on isolated occasions.

Appellant submits that the evidence referred to, together with the additional evidence pointed out

hereinabove, demonstrates that appellant had established a substantial business and a substantial number of customers in a trading area which extended down the San Francisco peninsula to and including San Jose. And when it is considered that the evidence further shows that appellee's store is likewise patronized by residents of Palo Alto, Redwood City, Los Gatos, Los Altos and other peninsular communities, as well as San Jose (Tr. 260) and that the two businesses compete for the patronage of the very same persons (See evidence referred to in Brief For Appellant, pp. 16-17) it is clearly seen that the trial Court committed prejudicial error in failing to give effect to such material undisputed evidence, and failing to make specific findings in accordance therewith.

The general statement in Finding III that appellant's patrons included some persons from areas throughout the United States other than San Francisco and Oakland, fails to determine this material issue. Appellee's suggestion in this portion of his brief that appellant is precluded from obtaining a more specific finding on the point under consideration because of the more general language used in plaintiff's complaint is reminiscent of an argument in support of a special demurrer, and is contrary to the letter and spirit of the new Federal Rules of Civil Procedure which require that a complaint contain no more than a short and plain statement of the pleader's claims (Rule 8) and that demurrs, pleas and exceptions for insufficiency of a pleading shall not be used. (Rule 7(c).)

Finally, appellee's emphasis upon that portion of Finding III which states that a substantial part of appellant's customers consist of passing pedestrian traffic does not negative the materiality of appellant's request for a finding that appellant likewise had a substantial and regular patronage from the communities on the San Francisco peninsula. Whether appellant had this last mentioned patronage and whether appellee's store competed for such patronage were important questions in the trial Court.

**D. Appellant's business was an expanding one.**

Appellee, at page 37 of his brief, makes an effort to avoid the effect of the cases cited by appellant which apply the rule that a prior trader is entitled to equitable protection in the exclusive use of his trade name not only within the immediate locality where his business has been previously conducted but also within such territory as may reasonably be expected to constitute a likely field of normal expansion (see Appellant's Brief, pp. 58-65). Appellee urges that the expansion which appellant admittedly did carry out in California between 1930 and 1944 did not follow a pattern of expanding from populous cities into smaller nearby communities. Apparently appellee hopes in this way to eliminate the effect of the admitted fact that appellant's business has consistently been an expanding business and that the policy of expansion has as consistently been applied in California. Appellee has not cited any case which detracts from the authority of the cases cited by appellee.

lant in support of the rule protecting a prior business as above enunciated.

Because appellee could not dispute either the evidence or the law which thus protects appellant against unfair competition in a subsidiary area such as San Jose, appellee has instead raised a purely incidental issue, as to the manner in which appellant has carried out its expansion plan in California. Appellee contends that although the testimony adduced by appellant is that its practice is to open a store first in a populous area and, after establishing in such store a nucleus of business from surrounding areas, to open a store or stores in such areas, the evidence shows that appellant did exactly the reverse in California.

Even if the evidence supported this contention of appellee that would be no answer to the failure of the Court to find in accordance with the undisputed evidence that plaintiff had and actually carried out in California, as elsewhere, a plan of consistent and continuous expansion, and on the basis thereof appellant would be entitled to the benefit of the rule of law above stated. However, the contention of appellee, though unimportant to the real issue, is in fact contrary to the evidence. Appellee argues that rather than first opening in populous areas and then expanding into surrounding areas appellant has in California first started in surrounding areas and then opened in the large cities. In reaching this conclusion appellee has made unwarranted assumptions. The evidence is that appellant opened five stores in Southern Cali-

fornia in 1930. It does not appear in what chronological order these stores were opened. Appellee assumes nevertheless and asserts that the first store was opened in Pasadena, although stores were also opened in that same year in Los Angeles, San Diego, Santa Barbara, and San Bernardino. Based on his unsupported assumption appellee then urges that appellant was acting contrary to its professed plan of expansion because it opened in an area subsidiary to Los Angeles before it opened in Los Angeles. Even if there were support for appellee's assumption, it does not follow that it proves any material departure from appellant's plan. For all that appears, appellant may have been attempting for a long time to obtain a favorable location and lease in Los Angeles and may have actually obtained its Pasadena lease and opened that store after the Los Angeles store had been opened and had demonstrated substantial patronage from Pasadena. San Diego and Santa Barbara, approximately 125 miles and 90 miles respectively from Los Angeles, are each desirable locations and independent centers of population and whether those stores were opened before or after the Los Angeles store does not materially bear upon the incidental issue raised by appellee that appellant did not actually pursue its professed method of carrying out its expansion plans.

As to Northern California, it is not questioned by appellee that the San Francisco and Oakland stores were opened in 1934 and 1935 and that all subsequent stores and locations for stores were acquired thereafter. Appellee stresses the fact that several years

prior to the opening of the San Francisco and Oakland stores appellant had taken leases in Sacramento and San Jose and that this proves that appellant's plan is merely to take leases wherever they give promise of being profitable regardless of any plan of expanding therefrom into the surrounding areas. In the first place, stores in Sacramento and San Jose actually were not opened before the stores in San Francisco and Oakland, and conceivably that could be because appellant at that time decided it should follow the particular method of expansion above referred to. In the second place, Sacramento and San Jose are themselves populous centers with substantial areas for the production of patronage. It well may be that at that particular time appellant was unable to obtain in San Francisco and Oakland the 100 per cent locations which it desired and rather than hold up its entire expansion program in Northern California it determined at least to make a start with available locations in Sacramento and San Jose.

Whatever may be the true reason for the particular method of expansion which appellant did follow, as to which the record is silent, the evidence does show without dispute that appellant has followed a consistent program of expansion not only in other parts of the country, but in California, interrupted only during the period of the financial depression, so that commencing in 1930 and up to the time when appellee opened his store in San Jose appellant had opened in California 14 stores, and had acquired by lease or purchase locations for 14 additional stores, including

locations in San Jose, Burlingame, San Mateo and Palo Alto. On the basis of such evidence and the authorities cited in the Brief For Appellant, pages 57-65, San Jose was clearly within the territory reasonably to be included within the likely field of normal expansion of appellant's business.

Appellee's Brief (p. 46) states that it is not necessary to discuss the authorities cited by appellant because in every instance where relief was granted, there was evidence either of fraudulent intent or that the aggrieved party had first done business in the territory in question by mail order, traveling salesmen or otherwise. The authorities cited by appellant may not however be thus disposed of. There are a number of cases cited by appellant which cannot be distinguished in the manner stated by appellee. Examples are:

- Groceteria Stores v. Tebbetts* (Wash.), 162 P. 54, (Brief For Appellant, pp. 42-45);  
*Rainbow Shops v. Rainbow Specialty Shops*, 27 N.Y.S. (2d) 390, (Brief For Appellant, pp. 61-62);  
*Rhea v. Bacon*, 5 Cir., 87 F. (2d) 976, (Brief For Appellant, pp. 57-58);  
*Terminal Barber Shops Inc. v. Zoberg*, 2 Cir., 28 F. (2d) 807, (Brief For Appellant, pp. 58-61);  
*Stewart's Sandwiches Inc. v. Seward's Cafeteria Inc.*, 60 F. (2d) 981 (D. Ct. N.Y.), (Brief For Appellant, pp. 62-63).

We have found no case and appellee has cited none which is to the contrary. In the cases cited by appellee

lee (Brief For Appellee, pp. 45-56) the complaining party had done no business in the area in question, had no customers in that area and had done nothing from which it could be concluded that such party had any real intention of entering such area at any reasonably foreseeable future time.

**E. Appellee took no precautions to distinguish his business from that of appellant.**

Subdivision E of the Brief For Appellee (p. 46) discusses appellant's complaint of the failure of the trial Court to find that appellee had never done business as "Lerner's" prior to the time that he opened his store in San Jose. Appellee states that the failure to make such a finding is immaterial and also that "it is contrary to the record". (Appellee's Brief, p. 47.) Appellee makes no reference to the Transcript at this point to support the latter statement nor is it supported by the record. Appellee at another point refers to the Transcript (Tr. 267-269) which indicates that when appellee was in the manufacturing business with his father he called upon the retail trade (not the consumer trade) in San Jose. Appellee did not however contend that either he or his father had ever done business as "Lerner's". He testified to the contrary, namely, that the business was carried on under the name of "L. G. Lerner". (Tr. 269.)

Appellee's contention as to the immateriality of the requested finding is that he was first in the retail ladies' ready to wear business in San Jose under a name including the word "Lerner's" and therefore appellant could not be prejudiced by the absence of

a finding that appellee had never before done business as "Lerner's". This completely begs the question. It is established that at least a majority of the persons doing business with or knowing of appellant refer to it as "Lerner's". It is also established that at the time appellee opened his store in San Jose appellant had customers in San Jose and the surrounding area. When appellee opened his store and called it "Lerner's" and advertised it as such without identifying his business as one belonging to an individual who happened to have the surname of "Lerner", it was inevitable that the persons in San Jose and surrounding area who refer to appellant as "Lerner's" would conclude that it was appellant which was opening the store of appellee. These facts do make it significant that appellee had never before done business as "Lerner's" and the Court should have made such a finding.

The same significance attaches to the fact that appellee had never before engaged in the retail business either in San Jose or anywhere else, and the Court should have so found. Appellee again seeks to dismiss these facts as immaterial but they are most material as a part of the complete picture which establishes that when appellee, who had never engaged in the retail business before and had never been known in any business as "Lerner's" opened a store under that designation, in an area where appellant had customers who knew appellant as "Lerner's", he was deliberately or otherwise misleading a portion of the public in San Jose and surrounding areas into believing that appellee's store was in fact a store of appellant.

F. The evidence does not support the finding that appellee took precautions to distinguish his business from that of appellant.

Appellant has objected to the trial Court's finding that appellee took reasonable precautions to prevent confusion between his business and that of appellant. Appellee contends that there is evidence to support such finding. In his Brief (p. 48) he refers specifically to the form of newspaper advertising used by appellee and that appellant uses only the name "Lerner Shops". Apparently appellee intends thereby to state that since appellee advertised and designated his business as "Lerner's" and appellant itself used only the name "Lerner Shops" appellee was taking precautions to prevent confusion. Appellee however ignores entirely the undisputed evidence that most of appellant's customers and persons knowing of appellant refer to it and know it as "Lerner's". The newspaper advertisements which accompanied the opening of appellee's store (Tr. 12-15) contain no indication whatever that they did not refer to a store of appellant, nor any indication that they refer to a store of an individual making his initial entrance into the retail ladies' apparel field and unconnected with the previously well known business of appellant.

There is no evidence to support appellee's assertion (Appellee's Brief, p. 49) that the stores of Lerner-Vogue in some of the area in Kansas and Missouri where appellant does business did not create confusion or damage. On the contrary, it does appear that litigation ensued, as the result of which Lerner-Vogue changed the name of certain of its stores to "J. S. Lerner-Vogue" and discarded completely the name "Lerner" with respect to its other stores. (Tr. 142.)

H. Appellee's newspaper advertisements were likely to cause confusion as to identity.

In subdivision H of his Brief (p. 50) appellee in effect admits that appellant and appellee carried competing items at prices which were within the same ranges. He seeks to justify the Court's finding that his newspaper advertising showed the difference between the two businesses by urging (pp. 51-52) that a person reading an advertisement of appellee relating to an article also carried by appellant at a price also charged by appellant would not necessarily assume thereby that appellee's store belonged to appellant. Appellant does not urge and is not required to urge that every person acquiring knowledge of appellee's store or his advertisements was misled or confused; it is sufficient if there was a likelihood that some persons, exercising reasonable care, would be misled. (*Schwarz v. Schwarz*, 93 Cal. App. 252, 255; *R. B. Davis Co. v. Davis*, 11 F. Supp. 269.) And the evidence established, as pointed out hereinabove, that there were persons who actually were misled.

I. The evidence does not show that appellee's store was distinctive in character or appearance.

In subdivision I of Appellee's Brief (p. 52) he discusses appellant's objection to the finding that appellee's store is of a different character and appearance from appellant's stores so as to make confusion improbable. The evidence shows that appellee's store is approximately 20 feet wide. (Tr. 258.) Appellant's Grant Avenue store in San Francisco has a frontage of 20 feet (Tr. 92), and its Oakland store has a frontage of 18 feet. (Tr. 92.) Appellant used a billboard

type of sign on its stores in San Francisco and Oakland. (Tr. 89-90.) Appellee used the same type of sign. On his sign the most prominent feature and the one occupying most of the space is the name "Lerner's". The same designation was featured on the show windows, boxes and bags. The stores of the parties carried similar items of merchandise in price ranges which overlapped.

Appellee does not and cannot dispute these facts. He has failed to point out any physical features of dissimilarity which would support the finding in question, from which it should be concluded that there is no evidence which does support it.

J. There was actual confusion between the two businesses. There was no evidence to the contrary.

Under subdivision J of Appellee's Brief (p. 53) he asserts that the trial Court was justified in making a finding contrary to the undisputed evidence that persons had dealt with appellee believing that they were dealing with appellant. In the first place the evidence on this point, while given by employees of appellant, was legally admissible (*S. C. Johnson & Son v. Johnson*, 28 F. Supp. 744, 749, affirmed as modified, 116 F. (2d) 427), and in cases of this kind, with rare exceptions, it is the only kind of evidence obtainable, particularly in view of the fact that appellant carries on a cash business and has no list of customers' names or addresses. The case cited by appellee, *American Automobile Ass'n v. American Automobile Owners Ass'n*, 216 Cal. 125 (Appellee's Brief, p. 54) was one in which there was conflicting

evidence concerning the matter in dispute. Such case is not contrary to the rule that while the trial Court has the right to weigh the evidence it does not have the right arbitrarily to reject the only evidence in the case on a material point. (See, *Grigsby v. Davey*, 207 Cal. 181, 186.) If there were conflicting evidence or the evidence were such as to require some credulity to believe it, or if it had other indications of internal weakness there could be a basis for the exercise of discretion by the trial Court in accepting or rejecting it. But in this case the evidence was not disputed, it was presented by not one, but a number of witnesses, and the confusion testified to was most natural, if not inevitable, in view of the similarity of names, the widespread reputation of appellant, the similarity of merchandise and prices and the fact that theretofore appellee was completely unknown in the retail business and persons who had done business with appellant and referred to it as "Lerner's" and had never done business with or even heard of appellee, would almost of necessity conclude that the store opened by appellee was in fact opened by appellant.

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#### CONCLUSION.

In spite of the findings made by the trial Court and its failure to find on certain material issues, the evidence in this case is such that when considered under the rules applicable to a review by this Court of a case of this kind, it requires the reversal of the judgment for appellee and the granting of relief to

appellant. The nature and extent of the relief to which appellant is entitled is discussed in the Brief For Appellant, pages 66-79.

Under the authorities cited in the opening portion of this Reply Brief this Court may reverse the trial Court: (1) Where the findings are without substantial evidence to support them; (2) where the trial Court misapprehended the effect of the evidence; (3) even though there were evidence which, if credible, would be substantial, if the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.

(*Sanders v. Leech*, 5 Cir. 158 F. (2d) 486, 487.)

Appellant submits that the evidence discussed or referred to in its briefs herein fully establishes the following basic facts as uncontradicted or not open to serious question and fully justifying and requiring injunctive relief:

- (1) That appellee opened a store in San Jose engaged in the same line of business, carrying similar items of merchandise as the business and merchandise of appellant, and at prices in a price range overlapping the price range of appellant;
- (2) That appellant is known by at least a very large majority of its customers and the public as "Lerner's";
- (3) That although appellee had never before engaged in the retail business, had never carried on

any business in San Jose, had never been associated with any business known as "Lerner's" and his own name is Wilfred M. Lerner, he designated and advertised his store in San Jose as "Lerner's", without any distinguishing feature to differentiate him and his business from or prevent confusion thereof with appellant and its business; this in spite of the fact that appellee had known of appellant and had been in several of its stores;

(4) That appellant had throughout its long history adopted and pursued a policy of expansion and opening of new stores, not only in other parts of the country but also in California;

(5) That San Jose is within appellant's normal area of expansion and that appellant actually expanded into that city by taking a lease therein in 1941, long prior to the time that appellee opened his store, only the restrictions created by the war having prevented appellant from opening its San Jose store when it became entitled to possession thereof in July 1942;

(6) That when appellee opened his store appellant actually had customers in San Jose and nearby communities and had enjoyed a regular and continuous patronage from that area;

(7) That some of appellant's customers have been confused by appellee's designation of his business as "Lerner's" into believing that appellant had opened one of its stores in San Jose.

The foregoing furnish all of the requisites for injunctive relief in a case of this kind: Similarity if not identity of business and name; competition for the same patronage; actual confusion among customers as to the two businesses; and the prior right of appellant based on the long period prior to appellee's entry during which appellant and its business were known by the name which appellee adopted and which is merely his surname, not his full name.

Had the trial Court found the foregoing as facts, the basis for injunctive relief would be established beyond question. Merely because the trial Court made contrary findings as to some of these facts and no findings whatever as to others, should not deprive appellant of the relief to which it is entitled if in fact the evidence does not support the findings which the trial Court did make and does support findings which would afford relief to appellant. Not only the uncontradicted evidence, but certainly all of the evidence entitled to weight, viewed in the light of what frequently occurs and is known to occur in unfair competition cases of this kind, fully support and require the findings requested by appellant and relief against the unwarranted interference by appellee with the business and the goodwill which over many years appellant has created and built up.

No issue is here involved which would prevent appellee from engaging in any business he chooses at any location or locations he sees fit. There is here involved only the name by which appellee has determined to designate and advertise his business; not his

own full name nor a name under which he has ever before done business or been known; but a name, nevertheless, by which appellant has long been known in a business which it has built up over many years, having a valuable reputation and goodwill which under the law are entitled to protection.

The judgment should therefore be reversed and an injunction issued in favor of appellant for the relief to which it is entitled.

Dated, San Francisco, California,  
May 5, 1947.

Respectfully submitted,

JESSE H. STEINHART,

By S. A. LADAR,

*Attorneys for Appellant.*

(Appendix Follows.)

## **Appendix.**



## Appendix

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*Yellow Cab Co. of San Diego v. Sachs*, 191 Cal. 238.

The facts in this case were that for some time prior to 1920 the defendant Sachs had been engaged in conducting a taxicab business in San Diego under the name of Smith Taxicab Co. In the summer of 1920 he changed the name of this company to Yellow Taxicab Company of San Diego, and began to operate a fleet of yellow taxicabs under that name. In October 1920 one Uhler acting as a promoter of plaintiff corporation began negotiations with a Chicago concern looking to the establishment of a Yellow Taxicab service in San Diego under a system which had theretofore been established and used for approximately six months by the Chicago concern and by a Los Angeles concern. Uhler obtained a contract from the Chicago concern for the purchase of some of the Chicago company's taxicabs, but otherwise neither Uhler nor plaintiff corporation (which he organized) had any connection with the Chicago concern and had no connection whatever with the Los Angeles concern. Plaintiff corporation did not begin actual business operations in San Diego until February, 1921, which was subsequent to the date that defendant had begun to operate in San Diego. In January, 1921, plaintiff sued defendant, contending that the prior use by said Chicago concern of the name "Yellow Cab" and plaintiff's purchase of cabs from said Chicago concern and adoption of its system of

business gave plaintiff a prior right in San Diego to the use of the name "Yellow Cab" or "Yellow Taxicab Co.". The trial Court granted defendant a judgment of nonsuit which was affirmed by the Supreme Court of California. The opinion of the Supreme Court states as the basis for the judgment in favor of defendant the undisputed facts: (1) That the plaintiff was neither a successor nor a licensee of the original Chicago concern, nor in any way connected with the operations of the corporation which was doing business in Los Angeles; (2) that in any event the Chicago concern had never used the name in question in San Diego prior to the time the defendant began doing business in San Diego; (3) that *plaintiff itself* not having carried on any business in San Diego or elsewhere until subsequent to defendant's adoption and use of the name in question, had no cause of action against defendant.

*Tomsky v. Clark*, 73 Cal. App. 412.

In that case the evidence itself was not before the Court. The appeal was on the judgment roll, and the findings disclosed a situation where the plaintiffs had adopted as a business name the family name of one of the defendants who had been engaged in the collection business in San Francisco for many years before the plaintiffs began business and whose name had become well known and well regarded in San Francisco in such business. The business in which said defendant had been engaged continued to function until 1921 when it was aban-

doned for an interval until May 1922. During such interval said defendant, whose name was J. J. Rauer, and his associates were not engaged in the collection business. In the interval between the abandonment of said business and the beginning of a new concern in which said defendant became an officer and stockholder, the plaintiffs started a collection business under the fictitious name of Rauer Collection Company. No person named Rauer was connected with plaintiffs' business. Thereafter defendant Rauer and others organized said corporation in which defendant Rauer became an officer and stockholder and engaged in the collection business. The Court found that instead of the defendants having deceived the public by the use of a name similar to that which the plaintiffs were using, it was in fact the plaintiffs who deceived the public by having adopted a name not their own, under the circumstances above mentioned, and one which the public had long associated with the defendant J. J. Rauer and others. On those facts the trial Court not only refused to enjoin the defendants from using the family name of one of the defendants, but also enjoined plaintiffs from continuing to use a name which was not their own and which in fact deceived the public.

There is certainly nothing in those facts which warrants appellee's use of and emphasis upon his family name in competition with the plaintiff, which, with its predecessors, had used and been known by the same name for many years before appellee started his business. In fact the very quotation which ap-

pellee makes from the *Tomsky* case (Appellee's Brief, p. 22) fails to support appellee's statement and contention that a later comer has an absolute right to use his family name in a competitive business regardless of consequences; he must not resort to artifice or do any act calculated to mislead the public, a precaution which appellee has deliberately ignored in using and emphasizing the name "Lerner" by which appellant is known, rather than using his own name, "Wilfred M. Lerner", by which he was known before engaging in the retail business in competition with appellant.